FILE COPY

Office - Supreme Court,
FILED
JUN 28 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No. 124

PAULINE RINN, as Executrix of the Estate of WALTER P. RINN, Deceased, CHARLES F. POGGE and RAYMOND C. POGGE,

Petitioners,

vs.

BROADWAY TRUST AND SAVINGS BANK, JUSTIN J. JAEGER, Receiver, ARTHUR G. STRASSHEIM, Liquidator, et al.,

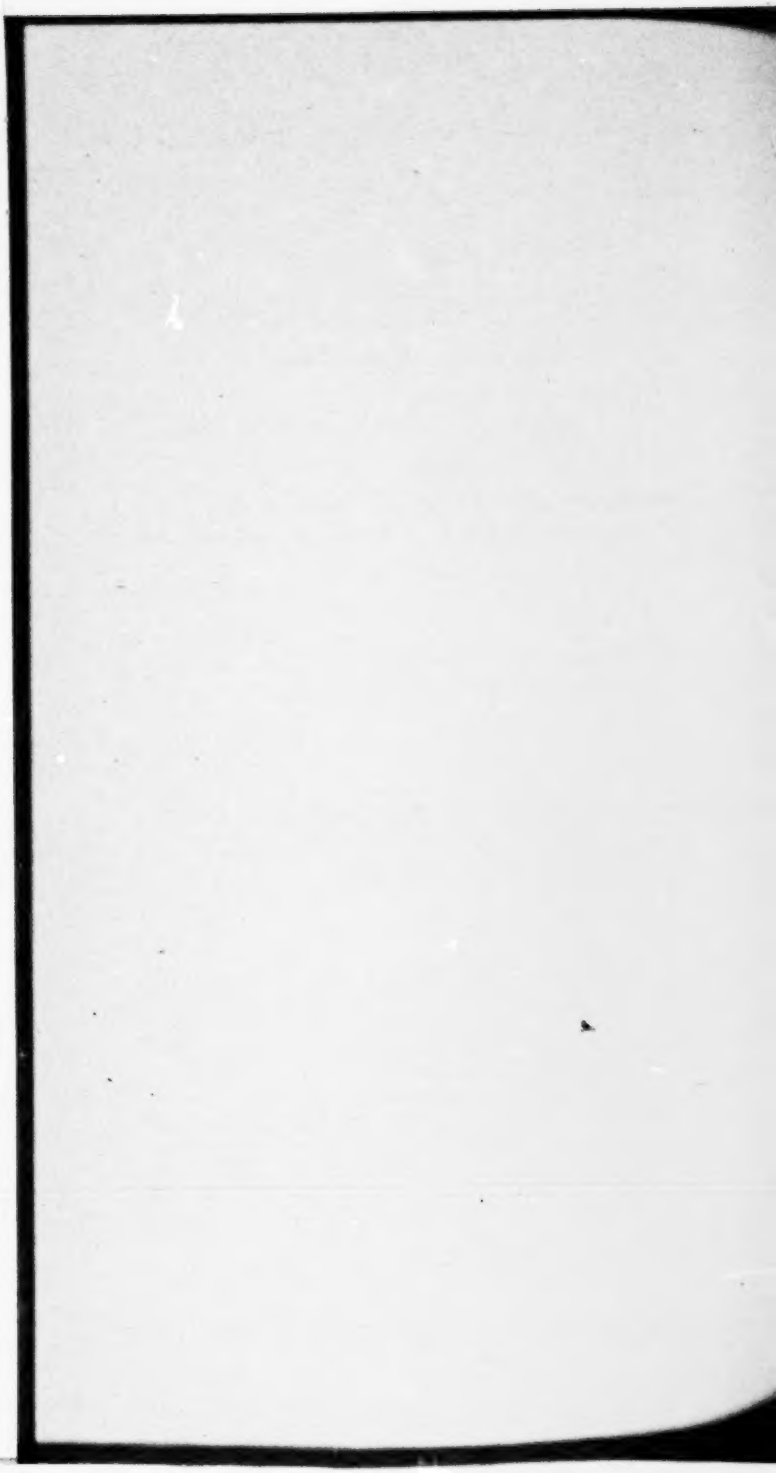
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOR THE FIRST DISTRICT.

MEYER ABRAMS,
134 N. LaSalle Street,
Chicago, Illinois,
HARRY J. MYERSON,
33 N. LaSalle Street,
Chicago, Illinois,
LEWIS D. ROSS,
33 S. Dearborn Street,
Chicago, Illinois,
Attorneys for Petitioners.

SHULMAN, SHULMAN & ABRAMS,
134 N. LaSalle Street,
Chicago, Illinois,
Of Counsel.

Midwest Law Printing Co., DELaware 6669, Chicago



INDEX.

PAGE

Petition for Writ of Certiorari:

Statement of the Matter Involved 2-4

Questions Presented 4-5

Reasons for the Allowance of the Writ 5-6

Specification of Errors Assigned 6-7

Prayer for Relief 8

Brief:

Jurisdiction Invoked 9-10

Opinion Below 10

A Statement of the Case 11-18

Argument 19-41

Summary of Argument.

I.

The federal question was raised timely by the petition for rehearing because of the unanticipated action of the Appellate Court in holding that the orders which were entered in the auditor's suit constituted res adjudicata, which opinion is based on a clear misconception of the facts and the law 19

(a) The federal claim was timely raised by the petition for rehearing for purpose of review, even though the petition was denied without opinion 19-20

(b) The judgment of the Appellate Court was based on a misconception of the facts and law, and its holding that the orders which were entered without notice and in violation of the status quo order were binding and conclusive on the petitioners could not have been anticipated.....20-23

II.

The Appellate Court deprived the petitioners of their property rights without due process of law, in violation of the 14th Amendment, when it concluded that the orders which were entered in the auditor's suit after the consolidation of that suit with plaintiff's action, without notice and in violation of the status quo order, were binding on the petitioners and were not assailable collaterally..... 23

(a) The Constitutional guarantee of due process under the 14th Amendment extends to state action through its judiciary as well as through its legislative branch 23

(b) Orders entered without notice in violation of a status quo order are void, and the decision that they are binding is in violation of the 14th Amendment 24

(c) All orders entered in the Auditor's suit after the acquisition of jurisdiction of the res in plaintiffs' suit were void ab initio and the alleged failure of proof did not add validity to the void orders 24-25

(d) The orders were properly attacked collaterally in plaintiffs' suit and the Appellate Court clearly deprived petitioners of their right to challenge the validity of the orders.....25-26

III.

The Appellate Court deprived the plaintiffs of their remedy to sue the liquidator of the bank contrary to its opinion on the former appeal and its decision is violative of the due process clause as guaranteed by the 14th Amendment..... 26

(a) The failure to liquidate the bank during the ten year period prior to the filing of this suit, without rendering any account to the stockholders and without even calling a meeting of the stockholders or directors was not a derivative action but belonged to the plaintiffs and that alone was sufficient to warrant relief.....27-29

(b) The proof of the mismanagement by the liquidator and the receiver was much stronger than the allegation in the complaint.....29-31

(c) The withdrawal of the funds by the defendants without accounting and the destruction of the records in violation of the status quo order was sufficient to warrant the relief.....32-33

IV.

The suit of the Auditor was collusive as shown by the admissions in the pleadings and by the demurrer to the evidence, and the dismissal of plaintiffs' suit for want of equity should have been reversed.... 33

V.

The overruling of the objection to the Receiver's account and the dismissal of the suit was palpably erroneous, and it was the duty of the Appellate Court to reverse the order..... 35

VI.

It was the duty of the Chancellor to default the bank and the Auditor and to enter a decree pro confesso against them, to discharge his receiver, to vacate all orders in the Auditor's suit, to dismiss it for want of jurisdiction and bad faith, and to enter an interlocutory decree for accounting against the other defendants. The court's order should have been reversed with directions to enter such a decree 36-37

(a) A decree pro confesso should have been entered against the bank and the Auditor, and the order denying the motion should be reversed with directions for the entry of such a decree..... 37-38

(b) Plaintiffs were entitled to a decree on the admissions in the pleadings, to discharge the Auditor's Receiver; to dismiss the Auditor's suit, to vacate all orders, to appoint a Receiver and to direct all of the defendants to account..... 38-39

(1) The suit of the Auditor and the appointment of his receiver were without jurisdiction and it was the duty of the Chancellor to annul all orders entered in the Auditor's suit, to discharge his Receiver, to reject the Receiver's account, to appoint a Receiver in plaintiffs' suit and to enter an interlocutory decree for accounting, and the Appellate Court should have reversed the decree..... 39-41

CASES CITED.

Altoona Warehouse Co. v. Bynum, 7 So. (2) 497, 503 29

Alwood v. Cahill, 382 Ill. 511, 513-514 31

Bank of Republic v. Wells-Jackson Corp., 358 Ill. 368 38

Baumgardner v. Boyer, 384 Ill. 584-587 24

Bodek v. Indemnity Insurance Co., 292 Ill. App. 363-371 24

Bosworth v. Terminal R. R. Ass., 174 U. S. 182, 186 26

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673, 677 19

Buck v. Citizens Coal Mining Co., 254 Ill. 198, 201 38

Burkett v. Reliance Bank & Trust Co., 367 Ill. 196, 201 24

Eastern Wisconsin Ry. v. Heckett, 135 Wis. 464, 115 N. W. 139-140 24

Edison v. Fleckenstein Pump Co., 249 Mich. 234 28

Farmers Loan Co. v. Lake St. Ry. Co., 177 U. S. 51 24

General Investment Co. v. Lake Shore, et al., 250 Fed. 160, 174 29

Haggard v. Smith, 71 Ill. 226 38

Harkin v. Brundage, 276 U. S. 43-55 24

Hellis v. Ward, 308 U. S. 365, 369 20

Herb v. Pitcorn, 384 Ill. 237-241 24

Herndon v. Georgia, 295 U. S. 441 20

Holden v. Lasheler-Cox Land Co., 316 Mich. 478 28

Little v. Chicago National Life Ins. Co., 289 Ill. 443-447 ..... 25, 36

Mathews v. Bank of Alendale, 38 S. E. 437, 442 (S. D.) 29, 31

Moore v. N. Y. Cotton Exchange, 270 U. S. 593-608 25

Nortzick v. Elman, 191 Ill. App. 71 26

People v. Depositors State Bank, 377 Ill. 600-609 24

Princess Lida v. Thompson, 305 U. S. 456-476 ..... 24, 36

Rinn v. Broadway Trust & Savings Bank, 326 Ill. App. 376 ..... 26, 39, 40

St. Louis Bridge Co. v. Eisele, 263 Ill. 50, 53 36

Saunders v. Shaw, 244 U. S. 317, 320 19

Shelley v. Kraemer, 68 S. Ct. 836, 842-843 23

Stebbins v. Perry County, 167 Ill. 567, 574 ..... 29, 36

Zahn v. Transamerica Co., 162 F. (2) 36, 48 29

Other Citations.

Fletcher Cyc. Corp., § 8081 29

Smith-Hurd's Illinois Ann. Stat., Chap. 110, §174(6) 38

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No.

PAULINE RINN, as Executrix of the Estate of WALTER P. RINN, Deceased, CHARLES F. POGGE and RAYMOND C. POGGE,

Petitioners,

vs.

BROADWAY TRUST AND SAVINGS BANK, JUSTIN J. JAEGER, Receiver, ARTHUR G. STRASSHEIM, Liquidator, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Pauline Rinn, as Executrix of the Estate of Walter J. Rinn, Deceased, Charles F. Pogge and Raymond C. Pogge, plaintiffs below, petition for the issuance of a writ of *certiorari* to the Appellate Court of Illinois for the First District, to review its judgment of January 5, 1948 affirming the decree of the Circuit Court of Cook County, which judgment became final by the denial of leave to appeal by the Supreme Court of Illinois on May 13, 1948.

STATEMENT OF THE MATTER INVOLVED.

Petitioners commenced a class suit in the Circuit Court of Cook County on April 4, 1944 against the Broadway Trust and Savings Bank of Chicago, which was in the process of a voluntary liquidation since 1934, and against its Liquidator, its officers and directors, seeking an accounting, the appointment of a receiver, a sale of its remaining assets, and the distribution of its proceeds among the stockholders. The court took under advisement the motion for leave to inspect the bank's records and for the appointment of a receiver, and ordered that everything shall remain in *status quo*. Thereafter, on April 28, 1944, the auditor of public accounts, who permitted the voluntary liquidation to proceed since 1934, appointed a receiver under Section 11 of the Illinois Banking Act and filed suit for the dissolution of the Bank. After overruling all motions to dismiss plaintiff's action because of alleged lack of jurisdiction, the court ordered the defendants to plead to petitioners' complaint and consolidated both suits.

Without notice to petitioners, and in violation of the *status quo* order, the auditor of public accounts procured orders approving the acts of his receiver, allowing the claims of the officers and directors of the Bank, and its Liquidator, some of which were assailed for fraud in petitioners' suit, and ordered a sale of the assets by the auditor's receiver. The auditor's receiver destroyed some of the books which were kept by the Liquidator so that the plaintiffs were in no position to examine them. Upon discovery of these facts, petitioners prepared an amended complaint which they presented to the Circuit Court of Cook County on November 27, 1944 in which they sought, among other things, to set aside the orders which were entered without notice and in violation of

the *status quo* order. The Chancellor, other than the one who previously ruled in favor of the jurisdiction, refused permission to file the amended complaint, and dismissed the original complaint for want of jurisdiction.

Petitioners prosecuted an appeal to the Appellate Court of Illinois for the First District and urged, among other points, that the court acquired exclusive jurisdiction in their suit; that the subsequent proceedings by the Auditor of Public Accounts and the orders entered therein without notice and in violation of the *status quo* order were void for want of jurisdiction; that the construction of Section 11 of the Banking Act by the trial court as vesting exclusive jurisdiction in the Auditor of Public Accounts, in a case where the Bank ceased to do a banking business in 1934 and was undergoing a voluntary liquidation for over ten years for the benefit of the stockholders after paying all depositors and *bona fide* creditors, operated to deprive the stockholders from any remedy and was in violation of the due process clause as guaranteed by State and Federal Constitutions. The Appellate Court sustained the petitioners when it reversed the judgment of the Circuit Court of Cook County with directions to permit the filing of the amended complaint (326 Ill. App. 376).

During the pendency of the appeal additional orders were entered, without notice. Upon the reinstatement of the case, amendments were filed seeking to set aside the additional orders for want of jurisdiction. Trial was had before the Chancellor, and at the conclusion of plaintiffs' case the defendants moved for a judgment in their favor on the ground that plaintiffs did not prove their case. The court sustained their motion and dismissed the action for want of equity by its decree of May 26, 1947. Petitioners prosecuted a second appeal to

the Appellate Court of Illinois, and urged in their brief that the allegations of the complaint were sustained by the proof and that the Chancellor erred in sustaining the motion to dismiss. The Appellate Court affirmed the judgment below and held, contrary to its previous opinions which it conceded to be "the law in the case", that all of the orders which were entered in the suit of the Auditor of Public Accounts were valid and binding upon the petitioners and that they had no right to sue independently and that the exclusive right of action was in the Auditor of Public Accounts; that petitioners should have intervened in the Auditor's suit and should have appealed from the orders, and not having done so, the orders were binding and conclusive. Petitioners filed a petition for rehearing which pointed out that the decision of the Appellate Court, which held that the orders were *res adjudicata*, notwithstanding their entry in violation of the *status quo* order and without notice, were violative of the due process clauses of the Illinois and Federal Constitutions. The rehearing was denied, and leave to appeal was denied by the Supreme Court of Illinois on May 13, 1948.

QUESTIONS PRESENTED.

The following questions are presented for the consideration of this court:

1. Whether the decision below that the allowances of the claims in the Auditor's suit, which were entered without notice and in violation of the *status quo* order, were binding and conclusive on the petitioners, notwithstanding the adjudication on the prior appeal that the trial court acquired jurisdiction of the subject matter and of the parties in their suit, deprived petitioners of their property without due process of law in violation of the 14th Amendment to the Federal Constitution and of Article II, Section 2, of the Constitution of the State of Illinois.

2. Whether the federal question which was raised on the first appeal and decided in favor of the petitioners was properly raised by the petition for rehearing on the second appeal as a result of the decision of the Appellate Court of Illinois which construed Section 11 of the Illinois Banking Act differently than it construed it in its first opinion when it held that the section did not operate to deprive petitioners of all remedies.

3. Whether exclusive jurisdiction was acquired over the *res* in petitioners' suit and all orders which were entered in the subsequent suit commenced by the Auditor were void and of no force and effect, even if the proof failed to sustain the allegations in petitioners' complaint, and petitioners were entitled to the relief to set aside the orders.

4. Whether stockholders of a bank which ceased to function as a banking institution for ten years and paid off all of its existing creditors may not maintain an action against the officers and directors of the bank and its Liquidator for an accounting and distribution of the assets after the refusal to render such an accounting and whether such stockholders may be deprived of any remedy as held in the opinion under the second appeal contrary to the opinion on the first appeal, and whether petitioners were deprived of their property without due process of law.

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. The decision on the second appeal that the allowance of the claims in the Auditor's suit is *res adjudicata*, notwithstanding that the orders were entered without notice and in violation of the *status quo* order, deprived the plaintiffs of their property rights without due process of law in violation of the 14th Amendment and is not in accord with the applicable decisions of this court.

2. Jurisdiction of the subject matter is not determined by the proof but by the pleadings. Exclusive jurisdiction of the *res* was acquired in plaintiffs' suit and all orders entered in the second suit during the pendency of the case which were also entered without notice and in violation of the *status quo* order, were void and of no force and effect, and the dismissal of petitioners' suit for alleged lack of proof, did not lend validity to the void orders as to prevent a collateral attack, and the decision is not in accord with the views of this court.

3. The decision on the first appeal that the construction of Section 11 of the Illinois Banking Act by the trial court deprived the plaintiffs of all remedies and that plaintiffs had a right to maintain the action, was irreconcilable with the decision on the second appeal which construed the section differently and deprived the plaintiffs of their remedy to sue the Liquidator and the officers and directors for an accounting for their stewardship during the ten year liquidation and held that orders entered without notice and in violation of a *status quo* order constituted *res adjudicata*. The determination involves matters of extreme importance and substantive rights of the plaintiffs were denied and the powers of this Court should be exercised to review it by the issuance of the writ.

SPECIFICATION OF ERRORS ASSIGNED.

1. The Appellate Court of Illinois clearly erred when it held that the allowance of the claims in the Auditor's suit constituted *res adjudicata*, notwithstanding the fact that the orders were entered without notice and in violation of the *status quo* order, and in a proceeding of which the court was without jurisdiction because of the

exclusive jurisdiction which was then vested in petitioners' suit, and its judgment is void.

2. Orders entered without notice and in violation of a *status quo* order are not only voidable, but void for want of due process of law, which is guaranteed by the Federal and State Constitutions, and the Appellate Court clearly erred when it held that these orders were not subject to collateral attack.

3. The Appellate Court erred when it refused to hold that the exclusive jurisdiction of the *res* was acquired in plaintiffs' suit and all orders entered in the Auditor's suit thereafter were void and of no force and effect even if the proof did not sustain the allegations in the complaint, and the petitioners were entitled to the relief to set aside the void orders.

4. The opinion is irreconcilable with the former opinion rendered by the same court which it conceded to be the law in the case, and the Appellate Court erred in entering the Judgment whereby it deprived the petitioners of their remedy to sue the Liquidator to account for his stewardship during the ten year voluntary liquidation, and to sue the officers and directors for an accounting, and petitioners were entitled to such relief even in the absence of fraud or negligence.

5. The Appellate Court erred when it held that the proof did not sustain the allegations and its decision is contrary to the record.

PRAYER FOR RELIEF.

Wherefore, petitioners pray that a writ of *certiorari* may be granted to the Appellate Court of Illinois for the First District to the end that this court may proceed as provided by law and the rules of this court in such cases and that upon a final hearing the judgment of the Appellate Court of Illinois for the First District be reversed with directions to reverse the judgment below and for such other proceedings as to this court may seem to be equitable.

Respectfully submitted,
MEYER ABRAMS and
HARRY J. MYERSON,
LEWIS D. ROSS,
Attorneys for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948.

No.

PAULINE RINN, as Executrix of the Estate of WALTER P. RINN, Deceased, CHARLES F. POGGE and RAYMOND C. POGGE,

Petitioners,

vs.

BROADWAY TRUST AND SAVINGS BANK, JUSTIN J. JAEGER, Receiver, ARTHUR G. STRASSHEIM, Liquidator, et al.,

Respondents.

BRIEF IN SUPPORT OF PETITION.

Jurisdiction Invoked.

The jurisdiction of this court is invoked to review the judgment of the Appellate Court of Illinois, on which leave to appeal was denied by the Supreme Court of Illinois on May 13, 1948, under Section 237(b) of the Judicial Code of the United States as amended by the Act of February 13, 1925 (43 Stat. 937, 28 U.S.C.A. 344(b)).

The federal question under the Fourteenth Amendment was raised on the first appeal, when the trial court construed Section 11 of the Banking Act of Illinois (Smith-

Hurd, Ill. Ann. Statutes, Chap. 16½, Section 11, page 336) so as to deprive the petitioners of any remedy. After obtaining a reversal of the order below, when the Appellate Court held that said Section 11 was inapplicable to Petitioner's suit and that the remedy was properly invoked in their suit, the federal question was again raised on the petition for a rehearing on the second appeal, when as a result of the unanticipated action of the Appellate Court it construed said Section 11 so as to deprive the Plaintiff of their remedy.

The jurisdiction is also invoked for the reason that the Appellate Court of Illinois held on the second appeal that the orders entered without notice and in violation of the *status quo* order in Petitioner's suit were not subject to collateral attack in Petitioner's suit and that these judgments were binding and conclusive on them. Such action was not anticipated prior to the decision of the Appellate Court of Illinois on the second appeal, and the petition is sought on the authority of *Sander* v. *Shaw*, 244 U. S. 317-320 and other decisions based upon the rule there announced.

The decision of the intermediate court of appeal after denial of leave to appeal to the Supreme Court of Illinois is reviewable by this Court by petition for certiorari (*Minn. St. P. R. Co.* v. *Rock*, 279 U. S. 410).

Opinion Below.

The opinion on the first appeal is fully reported (326 Ill. App. 376). The opinion on the second appeal is only reported in abstract (333 Ill. App. 157) and is printed in full in this record (pp. 105-111).

A Statement of the Case.

For a complete understanding of the case, it is necessary to give a brief outline of the history of the proceedings leading up to the inconsistent opinions of the Appellate Court of Illinois which first held that plaintiffs had the right to maintain the action and reached the opposite conclusion on the second appeal.

Commencement of Proceedings:

On April 4, 1944 petitioners filed their suit against the Broadway Trust and Savings Bank of Chicago, and against its Liquidator, its officers and directors, on the ground that the Bank ceased to function as a banking institution with the consent of the Auditor of Public Accounts and they were liquidating it since June 23, 1934, and failed to account up to the filing of the complaint (Abst. 1-2). Plaintiffs moved for permission to examine the books and records and for the appointment of a receiver, and the court entered the motion and ordered on April 5, 1944 that everything remain in *status quo* (Abst. 2). Thereafter, on April 28, 1944 at the request of the defendants, who opposed the examination of the books, the Auditor of Public Accounts appointed his receiver under Section 11 of the Illinois Banking Act, and he filed his suit on the following day seeking the approval of the acts of his receiver and a dissolution of the Bank (Abst. 2-3). The two suits were consolidated on June 14, 1944 with directions that all further orders be entered in the consolidated case (Abst. 103).

Violations of Order:

Without notice, and in violation of the *status quo* order, the Auditor's receiver obtained a decree on June 26, 1944

approving the acts of the Auditor and ordering the dissolution of the Bank (Abst. 3). He also obtained another order, without notice, on July 17, 1944 compromising two claims, one in the amount of $2,280.82 and another claim in the amount of $16,238.01 for $6250.00, payable $750.00 in cash and the balance in installments (Abst. 3-4).

Dismissal for Want of Jurisdiction:

On November 17, 1944 plaintiffs presented their Amended Complaint setting forth, among other things, the filing of fictitious claims by the Liquidator and other officers of the Bank, the entry of the order compromising the two claims (Abst. 12-13), the filing of the Auditor's suit by collusion with the defendants (Abst. 15), and praying among other things that the claims be disallowed; and that the orders be declared void (Abst. 17-19). The trial court denied leave to file the amended complaint, and contrary to the decision of the former Chancellor that the plaintiffs had the right to maintain the action and that the court had jurisdiction of the subject matter and the parties. he determined that the exclusive right of action under Section 11 of the Banking Act was in the Auditor of Public Accounts and he dismissed the action for want of jurisdiction.

The First Appeal:

An appeal was taken to the Appellate Court from the dismissal order and the denial to file the amended complaint. During its pendency further orders were entered in the Auditor's suit without notice. On April 25, 1945 the Auditor's receiver obtained the allowance of the personal claim of the Liquidator and two of the officers and directors for alleged rent during the liquidation period in the amount of $31,650.00. Another claim was

allowed to the corporation headed by the Liquidator in the amount of $3,142.95 (Abst. 5-6), and after first denying the claim of the Liquidator for another item, it was modified three days later (Abst. 55) by allowing him a claim for $5418.15. The receiver also obtained an order to sell all of the assets of the Bank and the assets were sold for $26,000 and the sale was confirmed on May 7, 1945 (Abst. 6). During the pendency of the appeal the Auditor's receiver collected for all the assets $41,668.63, disbursed $23,652.84, leaving a balance of $18,015.79 so that there are not sufficient assets to even pay the claim of the Liquidator and his associates for the $31,650.00. The Auditor and his attorney, his receiver and his attorney, obtained over half of the disbursement in fees (Abst. 39-40).

During the pendency of the appeals the Auditor's receiver destroyed some of the books and records of the bank with knowledge that plaintiffs desired these books for examination, and in violation of the *status quo* order (Abst. 77-78).

The Appellate Court of Illinois reversed the decision below and held that the trial court's construction of Section 11 of the Banking Act deprived the petitioners of all of their remedies. The court said (326 App. 376 at page 381),

> "The net result of these orders is to leave these stockholders out of court. They are not allowed an accounting from Sell, who was their trustee, or other defendants who were guilty of grave wrongs. The result seems to be to leave these plaintiffs without remedy."

In disposing adversely to the contention that plaintiffs had no right to maintain the action under Section 11 of the Banking Act, and vested the exclusive right of action

in the Auditor of Public Accounts, the Court said, at page 381:

> "The original charter had been issued to defendant as a banking corporation, but it had not been doing a banking business since June 23, 1934. (nearly 10 years). The depositors are paid. All the creditors it owed as a banking corporation have been satisfied. There is no one here who is complaining of this voluntary liquidation. The auditor knew of it (or his predecessor did) and for practically 10 years had acquiesced in it. Every obligation that has arisen out of this defendant doing a banking business has been satisfied. It has a mere shell of a charter. *Under quite similar circumstances* in the case of *M. R. Harris Estate* v. *West Grove Savings Bank*, 207 Iowa 41, the Supreme Court of Iowa *held that a statutory provision quite similar to that of our statute would not apply. We so hold here.*" (Emphasis ours.)

Subsequent Proceedings:

The Amended Complaint prepared in November, 1944, was filed, pursuant to the mandate of the Appellate Court, on August 17, 1945 (Abst. 6-19). For the purpose of setting aside the additional orders which were entered during the pendency of the appeal an amendment was filed (Abst. 20-21) seeking to set aside the decree of dissolution and all of the orders so that the *status quo* order of April 5, 1944 could be fully enforced, or in the alternative that the defendants be held liable and accountable for their wrongful acts and misconduct in the event the *status quo* order can no longer be enforced (Abst. 23). Another amendment was filed on January 15, 1947 substituting Arthur G. Strassheim as Liquidator instead of George C. Sell after an examination of the minute books which disclosed that he was the Liquidator, and it also asked that the receiver appointed by the Auditor should account for all funds and disbursements

(Abst. 47-48). After overruling all motions to dismiss and the filing of the answers by the respective defendants*, the matter was heard by the Chancellor in open court, and at the conclusion of plaintiffs' case the court sustained defendants' motion to dismiss on the ground that plaintiffs failed to prove their case (Abst. 89-94) and entered its decree of May 26, 1947 (Abst. 53).

The Proof:

Some of the plaintiffs owned their stock since 1921, when the Bank was organized (Abst. 95-99). The Bank notified all its depositors that it ceased to do a banking business and to call for their deposits on June 23, 1934 (Abst. 10). One of the plaintiffs, Rinn, called for his deposit, and about a year later asked its president and Liquidator, Arthur G. Strassheim; "Arthur, when are we going to get a statement of the affairs of the bank that you are liquidating?" and he answered, "O, that will take a year or two." He inquired several times thereafter and about three years later, the Liquidator told him, "You had better write that off" (Abst. 60). No accounting was ever given to the plaintiffs or to the stockholders since the commencement of the liquidation in June, 1934. William G. Wise, one of the defendants, a director and vice president of the Bank and the general counsel conceded that no meetings of the stockholders were held since June, 1934 and that no report was ever given to them since that date (Abst. 61-62), and admitted that the stockholders were entitled to a "full accounting" (Abst. 26-27). The defendants, who contested plaintiffs' right to examine the books and records of the bank, and who were parties to the *status quo* order, applied to the auditor of public accounts to take possession of the books and records (Abst. 86-87). His receiver took charge of all of the books on April 28, 1944 and,

* No answer was filed by the Auditor of Public Accounts or the bank and plaintiffs moved for a default against each of them.

although he knew on the date of his appointment of the entry of the *status quo* order (Abst. 77), he destroyed some of the books. He "knew at the time that the plaintiffs had asked the court to permit them to examine the books and records" and "with that knowledge" he destroyed the books (Abst. 78).

In violation of the *status quo* order the receiver obtained the allowance of the personal claim of Arthur G. Strassheim, the liquidator, and his associates in the amount of $31,650 for alleged rent during the liquidation period for property which was not occupied by the Bank except for a little space wherein the securities were kept, and which building was occupied by the liquidator and his Bond and Mortgage company and for his "currency exchange business" (Abst. 10) and for the business of another corporation known as Strassheim & Co. which was headed by the liquidator (Abst. 66). The receiver also procured the allowance of the liquidator's personal claim for $5418.15 and another claim of his company in the amount of $3142.95. He compromised a debt in excess of $19,000 for $6250 without making any inquiry as to the financial responsibility of the makers and guarantors of the debt (Abst. 80). He sold all of the assets of the Bank, including its vault for $26,000 to Henrietta Seipp (Abst. 487), who was an "invalid", residing out of Chicago, and who has not been out of her house for five years, and the sale was made to the cashier, of the Bank, Sell, who allegedly purchased it for her, but the real purchaser never saw the property, did not know its value, and the vault business which was operated before by the cashier of the Bank for the Bank is being operated by him and he signs the checks and makes all disbursements in operating that business (Abst. 74-75). Of the total collections that the receiver obtained in the amount of $41,668.63, which

includes the $26,000 from the sale of the assets, $11,680 was paid to the receiver and his attorney, over $2200 in custodian fees, over $6000 to the auditor of public accounts and to his attorney in fees (Abst. 49-50). If the claims of the liquidator and the other directors stand as allowed, there are no assets for the stockholders and they may also be liable for a deficiency.

Denial of Relief:

The Chancellor did not dismiss the suit on jurisdictional grounds but on the merits, for "want of equity". He held Plaintiffs were not entitled to sue the liquidator and the officers and the directors for an accounting for their liquidation of the bank during the past ten years, in the absence of proof of fraud or conspiracy, and that no such acts were proven.

Decision on Second Appeal:

Petitioners appealed from the decree, and urged that even in the absence of fraud or conspiracy Plaintiffs were entitled to an accounting and to set aside the void orders. The Appellate Court, in affirming the Decree, said in its opinion (R. 108):

> "On that appeal the defendants urged, as they urge on this appeal, that the court is without jurisdiction except in a suit brought by the State auditor under section 11 of the Banking Act. We denied that contention and held that the statute did not apply. Our decision is the law on this appeal, if the evidence on the trial established the facts alleged in the pleadings then before us. These facts, as stated (p. 381), were that the bank had not been doing a banking business for nearly ten years and that the depositors had been paid and every obligation that had arisen out of its banking business had been satis-

> fied. The evidence does not sustain the latter allegation. It was shown conclusively that obligations to general creditors were unpaid when the auditor's suit was instituted and when the amended and supplemental complaint was presented and at the time of the trial, after it had been filed pursuant to our mandate. Upon the facts established by the evidence, the right to dissolve the corporation and distribute its assets was vested exclusively in the State auditor under section 11 of the Banking Act * * * an application to the court supervising the liquidation of the bank. *McIlvaine* v. *City Nat. Bank & Trust Co., supra.* Acquiescence by the State auditor in the attempted liquidation of the bank and consequent delay in taking action did not bar his right to proceed under section 11."

In disposing of the point that the orders were entered without notice and in violation of the *status quo* order, the opinion says (R. 110):

> "Several of the items were covered by orders of court in the Auditor's Suit, from which no appeal has been taken,"

and the court, therefore, affirmed the Decree.

The Federal Claim:

It was urged in the Petition for Rehearing that the Appellate Court erred in sustaining the order on the ground that the jurisdiction was lost by failure of proof, as jurisdiction is not determined by proof but by the allegations; that when the orders were entered in the Auditor's suit, the paramount and exclusive jurisdiction was vested in the court in Plaintiff's suit, and all orders which were entered during the pendency of that suit were void *ab initio;* that such orders did not become valid after the dismissal of Plaintiff's action for the alleged failure of proof; that in holding that these orders were binding the Appellate Court deprived the petitioners of their property rights, in violation of the 14th Amendment to the Federal Constitution. However, the rehearing was denied (Abst. 101)

ARGUMENT.

I.

The federal question was raised timely by the petition for rehearing because of the unanticipated action of the Appellate Court in holding that the orders which were entered in the auditor's suit constituted res adjudicata, which opinion is based on a clear misconception of the facts and the law.

It was not anticipated that the Appellate Court of Illinois, which sustained the jurisdiction of the court in plaintiffs' action on the "pleadings", would on its second appeal, because of its erroneous conclusion that the proof was different from the allegations, hold that the orders which were entered in the second suit after exclusive jurisdiction was acquired in plaintiffs' action, were binding and conclusive. The federal question was, therefore, raised timely by the petition for rehearing.

(a) The federal claim was timely raised by the petition for rehearing for purpose of review, even though the petition was denied without opinion.

The law is well settled that where the federal question is presented by a petition for rehearing because of the unanticipated action of the reviewing court, that such a petition is presented *timely* even though the petition was denied without opinion (*Saunders* v. *Shaw*, 244 U. S. 317, 320; *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 677).

This court said in *Herndon* v. *Georgia*, 295 U. S. 441, (p. 444):

> "There is no doubt that the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it. *Saunders* v. *Shaw*, 244 U. S. 317, 320; *Ohio* v. *Akron Park District*, 281 U. S. 74, 79; *Missouri* v. *Gehner*, 281 U. S. 313, 320; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 677-678; *American Surety Co.* v. *Baldwin*, 287 U. S. 358, 367."

This was reiterated in *Hellis* v. *Ward*, 308 U. S. 365, 369.

(2) The orders were properly attacked collaterally in a misconception of the facts and law, and its holding that the orders which were entered without notice and in violation of the status quo order were binding and conclusive on the petitioners could not have been anticipated.

The Opinion concedes that if the "allegations" were sustained by the "proof" plaintiffs would have been entitled to the relief, as its decision on the former appeal is "the law in the case" as to the facts alleged, but this did not apply because the facts were different.* The alleged difference is according to this opinion that it was alleged "that the bank had not been doing a banking business for nearly ten years" and that the depositors "had been paid" and that "every obligation" that had arisen "out of its banking business had been satisfied", and "the evidence does not sustain" such allegations. It says that the proof showed that "obligations to general creditors were unpaid" when the Auditor's suit was filed.

The *only general creditors* which were allegedly not shown to have existed on the former appeal and which were shown by the proof to exist are (1) the Harris Trust

---

* Even if this be true, the failure of proof would not validate the void orders as jurisdiction is not lost by failure of proof (Moore v. N. Y. Cotton Exchange, 270 U. S. 593, 608).

& Savings Bank; (2) Reconstruction Finance Corporation; (3) Arthur G. Strassheim, individually; (4) Arthur G. Strassheim, et al., as lessors, and (5) Strassheim & Co. It appears from the Opinion (1) that the liability of the Harris Trust & Savings Bank was discharged in a comparatively short time"; (2) that the Reconstruction Finance Corporation "was paid off in 1939 or 1940." These two creditors *did not exist when the two suits were filed in* 1944 and the proof showed that they did not exist as found by the Appellate Court. Claim (3) of Arthur G. Strassheim, the Liquidator, in the amount of $5418.15 was disclosed to the Appellate Court on the prior appeal (Abst. 103) and this claim was assailed in the amended complaint (Abst. 12) which the lower court did not permit to be filed and which the Appellate Court ordered to be filed. Claim (4) of Arthur G. Strassheim, et al. as "lessors" for $203,166.48 which was allowed to the extent of $31,650 was *not an existing claim* as of the date when the bank ceased to function as a banking institution. It appears from that claim (Abst. 103) that the rent claim was for a period when the bank *ceased* to do its banking business as it covered the period from July 1, 1934 to April 28, 1944 and *the existence of this claim was shown by the record on this former appeal* (Abst. 103) and was *assailed* by the amended complaint which the Appellate Court directed to be filed (Abst. 12: ¶12) when it reversed the trial court. Claim (5) of Strassheim & Co., for $3,189.84 (Abst. 6) was not against the bank, but against its subsidiary (Abst. 3) and was first incurred in 1939, five years after the bank went into voluntary liquidation and *this claim was also assailed in the amended complaint* (Abst. 13) and appeared in the record on the *former appeal* (Abst. 103). It is evident therefore, that the statement in the opinion that the facts as shown by the proof were different from those alleged when the case was before it on the first appeal *is based on a clear misconception of the facts.*

The Appellate Court also overlooked the fact that neither the bank nor the Auditor of Public Accounts filed any pleading to the amended and supplemental complaint and *refused* to comply with the order of the court to plead (Abst. 31). The allegations of the amended and supplemental complaint upon which the first opinion was based, therefore, *stood as confessed* against them under the Civil Practice Act of the State of Illinois.

The statement in the Opinion that "if the receiver neglected or refused to account" the "remedy" of the petitioners as shareholders "was by an application to the court supervising the liquidation of the bank" is clearly based on a misapprehension of the facts. When plaintiffs filed their suit on April 4, 1944, ten years after the bank ceased to function as a banking institution and after its affairs were being liquidated, *there was no suit pending,* no receiver was in existence, *and there was no case wherein plaintiffs could have intervened,* as suggested by the court, and the receiver was first appointed on April 28, 1944 *subsequent* to the filing of plaintiffs' suit.

The Appellate Court also completely misconceived the record when it concluded that the order approving the compromise of claims in excess of $19,000 for $6250 *without notice* to the plaintiffs and in violation of the *status quo order* was not assailable and, particularly, when it said that the order was entered because of the "insolvency" of the makers and guarantor. The proof was that no investigation was made by the receiver as to the insolvency, and the "question of solvency or insolvency did not enter into the compromise" (Abst. 80).

It could not have been anticipated that the Appellate Court would misconceive the record and base its opinion on such misconceptions and reach an opposite conclusion

from that on the first appeal when it held then that said Section 11 of the Banking Act was inapplicable to a bank which ceased to function as a banking institution for ten years and which now held that the Section was applicable and that plaintiffs were not entitled to maintain the action and that the orders entered in the Auditor's suit were binding and conclusive upon them in the absence of an appeal, contrary to its holding on the first appeal.

II.

The Appellate Court deprived the petitioners of their property rights without due process of law, in violation of the 14th Amendment, when it concluded that the orders which were entered in the auditor's suit after the consolidation of that suit with plaintiff's action, without notice and in violation of the status quo order, were binding on the petitioners and were not assailable collaterally.

(a) The Constitutional guarantee of due process under the Fourteenth Amendment extends to state action through its judiciary as well as through its legislative branch.

It is well settled that the question of due process under the 14th Amendment is not only applicable to State action under its legislative branch, but also against action by the judiciary, and that orders entered without notice or opportunity to be heard do not constitute due process under the 14th Amendment (*Brinkerhoff Trust Co.* v. *Hill,* 281 U. S. 673, 677; *Shelley* v. *Kraemer,* 68 S. Ct. 836, 842-843).

(b) Orders entered without notice in violation of a status quo order are void, and the decision that they are binding is in violation of the 14th Amendment.

A *status quo* order is in the nature of an injunction (*Eastern Wisconsin Ry.* v. *Heckett,* 135 Wis. 464, 115 N. W. 139-140; *Bodek* v. *Indemnity Insurance Co.,* 292 Ill. App. 363-371). Orders entered in violation of the *status quo* order and without notice are void and come within the protection of due process laws under the 14th Amendment (*Shelly* v. *Kraemer,* 68 S. Ct. 836, 842-843). Such orders are also void under the Illinois law (*Burkett* v. *Reliance Bank & Trust Co.,* 367 Ill. 196, 201; *Baumgardner* v. *Boyer,* 384 Ill. 584-587). Essential elements of due process of law are "notice and opportunity to be heard" (*People* v. *Depositors State Bank,* 377 Ill. 600-609). Void orders are subject to collateral attack (*Herb* v. *Pitcorn,* 384 Ill. 237-241).

(c) All orders entered in the Auditor's suit after the acquisition of jurisdiction of the res in plaintiffs' suit were void ab initio and the alleged failure of proof did not add validity to the void orders.

It is conceded by the Appellate Court that its former opinion held that the trial court acquired jurisdiction in Plaintiff's suit on the alelgations and is "the law of the case." It follows that all orders entered in the Auditor's Suit were void while the plaintiff's action was pending and the failure of proof did not convert the void orders into valid orders. The paramount jurisdiction in Plaintiff's action was acquired by the court by motion for the appointment of a receiver and by the *status quo* order (*Farmers Loan Co.* v. *Lake St. Ry. Co.,* 177 U. S. 51; *Harkin* v. *Brundage,* 276 U. S. 43-55; *Princess Lida* v. *Thompson,* 305 U. S. 456-476). The jurisdiction was exclusive and not subject to interference

by any other person or court (*Little* v. *Chicago National Life Insurance Co.*, 289 Ill. 443-447). The jurisdiction was not lost by the alleged failure of proof, as jurisdiction depends upon the allegations and not on the proof (*Moore* v. *N. Y. Cotton Exchange*, 270 U. S. 593, 608). There, the court said:

> "Jurisdiction is the power to decide a justiciable controversy * * * and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue or to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proved."

The orders allowing the various claims to the Liquidator, and to officers and directors, and the compromise claims in excess of $19,000 for $6,250, the payment of fees and expenses to the auditors and his attorneys, to the receiver and his attorneys, were all made, entered and done while Plaintiff's action was pending and were not voidable but void, and Plaintiff had a right to assail them collaterally by their independent suit and the decision to the contrary deprived them of their rights, in violation of the 14th Amendment.

(d) The order was properly attacked collaterally in plaintiffs' suit and the Appellate Court clearly deprived petitioners of their right to challenge the validity of the orders.

The amended complaint challenged the validity of the claims filed by the officers and directors (Abst. 12-13). The entry of the order allowing the claims, was challenged for want of jurisdiction and lack of notice (Abst. 20-22). The proof showed that subsequent to the *status quo order* the receiver obtained an order, without notice, allowing the claim which was attacked in plaintiffs' action in the sum of $31,650 and he also allowed other claims (Abst. 6, 55). In addition to the fact that it

was without notice and in violation of the order, the allowances were made "on the sworn testimony of the receiver" (Abst. 6), which was highly improper in view of the fact that he was to be impartial (*Bosworth* v. *Terminal R. R. Ass.*, 174 U. S. 182, 186; *Nortzick* v. *Elman*, 191 Ill. App. 71). According to the receiver's report he used more than half of the estate in fees for the Auditor, the receiver, and their respective attorneys, there is left in his hands $18,015.79 (Abst. 49-50) which is not even sufficient to pay one claim of the Liquidator and his associates of $31,650.

These orders and the fees which were assailed in plaintiffs' suit were void *ab initio*, and were properly attacked in plaintiffs' suit. Even if no fraud was established by the proof it was the duty of the court to reverse the order which denied any of the relief for "want of equity", and the entry of the decree which deprived the plaintiffs of all remedies cannot be sanctioned under the Fourteenth Amendment.

III.

The Appellate Court deprived the plaintiffs of their remedy to sue the liquidator of the bank contrary to its opinion on the former appeal and its decision is violative of the due process clause as guaranteed by the Fourteenth Amendment.

The Liquidator was in possession of the assets since 1934 and failed to account up to date. An accounting was demanded of him by one of the plaintiffs and he told him to "write off" any claims to the assets (Abst. 59-60). On the former appeal the Appellate Court said (326 Ill. App. 376 at page 381):

> "The net result of these several orders is to leave these several stockholders out of court. They are

not allowed an accounting from Sell, who was their trustee, or the other defendants, who (if the allegations of the complaint are true, and they were verified) were guilty of grave wrongs. The result seems to be to leave these plaintiffs without remedy. The only answer made is that in the original suit of plaintiff the court was wholly without jurisdiction, and that the auditor under the statute had the exclusive right to liquidate the assets of a banking corporation. The statute, which we have already cited, so states. The facts as alleged here are quite unusual. The original charter had been issued to defendant as a banking corporation, but it had not been doing a banking business since June 23, 1934, (nearly 10 years). The depositors are paid. All the creditors it owed as a banking corporation have been satisfied. It has a mere shell of a charter. Under quite similar circumstances in the case of *M. R. Harris Estate* v. *West Grove Savings Bank*, 207 Iowa, 41, the Supreme Court of Iowa held that a statutory provision quite similar to that of our statute would not apply. So we hold here."

There is nothing in the record to justify this about-face.

(a) The failure to liquidate the bank during the ten-year period prior to the filing of this suit, without rendering any account to the stockholders and without even calling a meeting of the stockholders or directors was not a derivative action but belonged to the plaintiffs and that alone was sufficient to warrant relief.

Plaintiff, Rinn, a depositor and stockholder of the Bank, was notified that the Bank was giving up its banking business as of June 23, 1934. He and the other depositors were asked to call for their deposits (Abst. 59, Rec. 341) by the public announcement (Abst. 10). There, it was stated: "We are paying off our depositors on June 23, 1934," and that Arthur G. Strassheim was to conduct the Bond and Mortgage business and that

there was to be a "currency exchange" in the Bank building. Arthur G. Strassheim, the president of the Bank, was authorized by a resolution of the Board, dated as of July 31, 1934, "to *liquidate* all of the assets of the Bank and *make proper distribution* of the proceeds of such liquidation" (Abst. 44). A year later, Rinn said to him, "Arthur, when are we going to get a statement of the affairs of the bank that you are liquidating?" to which he replied, "Oh, that will take a year or two" (Abst. 59-60). Rinn, thereafter, inquired many times for a statement of the condition of the bank and was told "finally" that "you had better write that off" (Abst. 60).

The general counsel for the Bank, William G. Wise, one of its vice-presidents and directors, admitted in his answer *that no accounting was ever given to the stockholders since June,* 1934 and *"that all stockholders are entitled to have a full accounting"* (Abst. 27).

In *Edison* v. *Fleckenstein Pump Co.,* 249 Mich. 234, the court said (p. 237):

> "When it becomes apparent, as it did, that the corporation could not accomplish the purpose for which it was organized, that it was not possible to conduct business without loss, *it thereupon becomes the duty of the directors to wind up its affairs. Their failure to do so,* with its aggravation of loss, *was a breach of the trust reposed* in them by the stockholders, and, in a sense, *a constructive fraud upon them.* In such circumstances plaintiff stockholders might appeal to the inherent power of the court of equity, and, under authorities cited be afforded the relief prayed." (Emphasis ours.)

The case is cited with approval in *Holden* v. *Lasheler-Cox Land Co.,* 316 Mich. 478 (1947).

This rule was reiterated in *Altoona Warehouse Co.* v. *Bynum*, 7 So. (2d) 497, 503. See also *Fletcher Cyc. Corp.* § 8081.

Here is a much stronger case because not only had the corporation ceased to function for its corporate purposes, *but the directors adopted a resolution to liquidate its assets* and appointed a liquidator for the purpose of *liquidating* and *making distribution* and *no liquidation* was made for *ten years*. In such a case upon the facts which were admitted by the pleadings and sustained by the oral proof, the plaintiffs were entitled to the accounting and under no theory was it proper to dismiss the suit. *Mathews* v. *Bank of Alendale*, 38 S. E. 437, 442 (S. D.).

The Appellate Court completely overlooked the phases of the complaint which dealt with the allegation relating to such accounting and the proof which sustained the allegation did not involve the derivative phases of the complaint and on which the Appellate Court said there was a failure of proof (R. 109). The right to assail the *ultra vires* acts and for the accounting belongs to stockholders and not the corporation, and such rights were not derivative (*Stebbins* v. *Perry County*, 167 Ill. 567, 574; *General Investment Co.* v. *Lake Shore, et al.*, 250 Fed. 160, 174; *Zahn* v. *Transamerica Co.*, 162 F. (2) 36, 48.

(b) The proof of the mismanagement by the liquidator and the receiver was much stronger than the allegation in the complaint.

The liquidator held two notes: one for $2,280.82, dated March 28, 1934; and another for $16,238.09 dated February 26, 1939 (Abst. 4). He held a $6,000 mortgage as collateral for the notes—*which he surrendered* "without any consideration" to the makers of the notes (Abst.

80). No action was ever taken by him to collect any of these notes from the makers or from the guarantor. Subsequent to the filing of the complaint, and while the *status quo* order was in effect, the Auditor's receiver filed a petition seeking the approval of a compromise of the debt evidenced by these notes of about $19,000 for $6,250, of which $750 was to be paid in cash and the balance in installments, without any security. Without notice to the plaintiffs, and *in violation of the status quo order*, the auditor's receiver procured the approval of a settlement on July 17, 1944 (Abst. 3). The order recites (Abst. 4) that the approval was had "*"upon the investigation"* of the auditor's receiver. The order also recited that as a result of the sworn statement of the makers and guarantor and of *the receiver's investigation*, the court found that the makers and guarantor could only raise $750 cash from their assets and approved the settlement. The order was signed upon the approval of the Auditor.

The opinion says that the statement of the maker of the notes as to "his assets and liability" attached to the offer of compromise "was true and correct" and there is "nothing" to the contrary. The proof showed that the receiver did *not* check "whether there was any collateral" (Abst. 80). The receiver said he checked up on the makers and the guarantor and *did not find that they were insolvent* and that *the question of solvency or insolvency did not enter into the settlement.* After he stated in his petition that the debtors and the guarantor could only raise $750, he received within 60 days the $6250 in cash and did not try to ascertain whether the representations made to him that the debtors and the guarantor could not raise more than $750 was true, and "did not try to find out

whether they could pay more" but surrendered the note and the guarantee (Abst. 80; Rec. 531).

In an almost identical case the contrary views were expressed in *Burket* v. *Reliance Bank & Trust Co.*, 367 Ill. 196.

The Opinion assumes the truth of the Answer (R. 110) that the original loan was for $6,000 and that "with the accrued interest" it amounted to $16,238.01 when a new note was given February 26, 1939 in *renewal* thereof. The statement in the answer was merely a *denial* of the allegation in the Complaint that the Liquidator had made a new loan on February 26, 1939 (Abst. 7; par. 2). Such a denial of an affirmative nature in an Answer *does not constitute an affirmative defense* which is deemed admitted by failure to reply (*Alwood* v. *Cahill*, 382 Ill. 511, 513-514). Besides, the falsity of the Answer was apparent in that the bank was organized August 10 1921 (Abst. 7; par. 2) and even if the loan was made on the day of the opening, the $6,000 principal plus accrued interest to February 26, 1939 when the alleged new note was executed in the amount of $16,238.01 *could not have aggregated such amount under any mathematical computation*, and it should not be overlooked that there was another note of $2,280.02, making the total debt $18,518.83 which was settled for $6,250. Even if the story be true that these were *renewal* notes, the Liquidator *had no right to make the renewals* five years after the bank went into liquidation, but it was his duty to collect the notes, and he is liable and accountable for the failure to collect (*Mathews* v. *Bank of Allendale*, 38 S. E. 437, 442).

(c) The withdrawal of the funds by the defendants without accounting and the destruction of the records in violation of the status quo order was sufficient to warrant the relief.

The Liquidator paid to his real estate firm, Strassheim & Co., the sum of $6,835.99 evidenced by twenty-one checks during October 1934 and May 1937 (Abst. 46-47; Exhs. 3-25). George C. Sell, the Cashier of the Bank and the Assistant Liquidator "could not tell" why these payments were made and stated that "the records will have to prove that" (Abst. 61; Rec. 431).

Several checks were drawn to the order of George C. Sell (Abst. 46). He said that he endorsed the checks for "currency" in order to "pay off depositors" (Abst. 66-67). According to him, there were "no records" showing to whom the funds were paid, but he *conceded* that "when a depositor gets his cash" he has to sign "a withdrawal slip" and he *had such withdrawal slips* which he claimed to have turned over to the Receiver, and he had "everything". The receiver on the other hand said (Abst. 78):

> "We destroyed a lot of subsidiary records—old records. *We destroyed the books showing payments to the depositors. I presume we had withdrawal slips or refunds for depositors and they were destroyed.* They were destroyed about May, 1945. I had no instructions to destroy them. That is routine. *I knew at the time that the plaintiffs had asked the court to permit them to examine the books and records of the bank and with that knowledge, I destroyed the books.*

This was done by the person who was appointed by the Auditor with knowledge of the pendency of plaintiffs' suit and the *status quo* order!

The evidence of the receiver, quoted above, refutes the statement in the opinion (R. 110) that only "certain secondary records" were destroyed and that the "missing records" would not have thrown "any light on any of the transactions. The "withdrawal slips" which were "destroyed" would have been the only proper evidence tending to show whether the funds were properly used. The receiver admitted (Abst. 82; Rec. 549) that he "did not trace the withdrawals with the funds deposited". He made a complete examination in 1944 (Abst. 82; Rec. 541) but refused to produce it "because they are confidential records." The failure to produce it is evidence against the defendants.

IV.

The suit of the Auditor was collusive as shown by the admissions in the pleadings and by the demurrer to the evidence, and the dismissal of plaintiffs' suit for want of equity should have been reversed.

The Auditor's Receiver admitted that on April 28, 1944 *he knew* of the pendency of plaintiffs' suit (Abst. 515). The Auditor filed his suit on the following day (Abst. 2-3). The Auditor "agreed to the voluntary liquidation" in 1934 (Abst. 76; Rec. 504) and he received the $10,000 to pay off the depositors who could not be found.

The fact that from 1934 to 1944 the Auditor permitted the voluntary liquidation and that he did not appoint his Receiver and did not file his suit until ten years later; the fact that he appointed his Receiver to take charge of the books of the bank, with knowledge that the books were wanted by the plaintiffs for examination, and in violation of the *status quo* order destroyed the books; the fact that without notice and in violation of the *status quo* order he allowed the claims of the officers and directors of the bank of the Liqui-

dator, based upon the "sworn testimony of the Receiver", indicates a collusive deal between the Auditor, his Receiver, and the defendants. However, plaintiffs went further with the proof. They offered evidence tending to show that the Auditor's suit was filed at the request of the attorney for the defendants, and to aid them to escape the liability for their misconduct (Abst. 83-86).

The opinion says (R. 111) that "undoubtedly this action was taken at the suggestion or request of the defendants" but this does not show "collusion" as the Auditor did it "in the discharge of the duties imposed" upon him. Why should the defendants who were in charge of the bank for ten years suddenly invite the Auditor to take charge of the assets and the books and records? Why did the Auditor come to their aid when he knew that a suit was pending and that the court had under advisement plaintiffs' motion to examine the books and appoint a receiver? On defendants motion it was the duty of the Chancellor and of the Appellate Court to draw the proper inferences and deductions in the most favorable light to the plaintiffs.

The issue whether the Auditor appointed the Receiver and commenced the suit in order to deprive the plaintiffs of the opportunity to examine the books was of extreme importance. Such a charge was made against him in the Amended Complaint (Abst. 15; ¶17). *The Auditor did not deny this charge. The failure to deny constituted an admission under the Civil Practice Act.* His answer to the Second Amendment (Abst. 51; Rec. 238) that the cause which he commenced was a *bona fide* cause and was filed in good faith was a mere conclusion and it was the duty of the Chancellor to sustain the motion to strike it (Abst. 51; Rec. 242). At any rate, the

answer to the Second Amendment is not a denial of the allegations in the Amended Complaint (Abst. 15-16) which charged (¶ 17) that he commenced the proceedings at the request of the defendants "to prevent the plaintiffs from obtaining access to the books and records and to enable them to prove up their claim" nor are there any denials to the allegations (¶ 18) that the Auditor acted "in violation of the order of the court that everything remain in *status quo.*" The proof showed that his receiver *deliberately destroyed the books and records with knowledge of the status quo order* and that plaintiffs desired to examine their records (Abst. 78).

V.

The overruling of the objection to the Receiver's account and the dismissal of the suit was palpably erroneous, and it was the duty of the Appellate Court to reverse the order.

The Receiver's account showed that he received from all of the assets a total of $41,668.63 (Abst. 39) and disbursed $23,652.84 (Abst. 40) leaving a balance in his hands of $18,015.79 against claims which he allowed in excess of $40,000 (Abst. 6, 55) to the defendants. Among the disbursements were $6400 to the Receiver; $2,082.50 to his Clerk; $2,207.50 to his "Custodian"; $590 to his "police guard", in addition to $484.01 for "Burglary and robbery protection". There was paid (Abst. 40) $1,270.98 for "State Auditor's fees"; $3,165 to the Receiver's attorney. Plaintiffs objected to the Report on the ground that "all the disbursements were illegal and void" (Abst. 52; Rec. 253). The decree (Abst. 53) overruled the objections and dismissed the suit for want of equity. This was clearly erroneous. The burden to justify the distribution was cast upon the Auditor and his Receiver.

His appointment was made subsequent to the filing of plaintiffs' suit. The distributions were made without notice to the plaintiffs and in violation of the *status quo* order. The order overruling these objections was on the demurrer to the evidence. A Receiver who defied the court, who destroyed the books and records with knowledge that these books and records were wanted to prove plaintiffs' case (Abst. 78), *is not entitled to a reward,* nor is his attorney entitled to compensation.

The fees and disbursements were made in the Auditor's suit after the exclusive jurisdiction was obtained of the *res* in plaintiffs' suit and all the acts of the receiver were void (*St. Louis Bridge Co.* v. *Eisele,* 263 Ill. 50, 53; *Little* v. *Chicago National Life Ins. Co.,* 289 Ill. App. 433; *Princess Lida* v. *Thompson,* 305 U. S. 456, 476 *supra*). The affirmance of the decree was clearly erroneous.

VI.

It was the duty of the Chancellor to default the bank and the Auditor and to enter a decree pro confesso against them, to discharge his receiver, to vacate all orders in the Auditor's suit, to dismiss it for want of jurisdiction and bad faith, and to enter an interlocutory decree for accounting against the other defendants. The court's order should have been reversed with directions to enter such a decree.

Plaintiffs moved for the default of Arthur C. Lueder the Auditor of Public Accounts for failure to file an appearance, for the default of the Broadway Trust and Savings Bank of Chicago for want of an answer, for an order dismissing the action commenced by the Auditor of Public Accounts for want of jurisdiction, to appoint a Receiver, and for an interlocutory decree for accounting against the other defendants based on the admissions in the pleadings (Abst. 35; Rec. 164). The Chancellor de-

nied the motion and his order should have been reversed with directions to grant the motion.

(a) The decree pro confesso should have been entered against the bank and the Auditor, and the order denying the motion should be reversed with directions for the entry of such a decree.

On May 24, 1946 plaintiff moved for a rule on the Auditor to plead to the amended and supplemental complaint (Abst. 30; Rec. 143). The Auditor was served with process and failed to file an appearance. The Bank was also served with process and was represented by counsel but filed no defense. Instead of granting the motion, the court directed the Auditor to answer within ten days from May 24, 1946 (Abst 31; Rec. 151). No answer was filed within that time and the plaintiffs again moved for a default on June 20, 1946 and for the entry of a decree dismissing the Auditor's action for want of jurisdiction, to appoint a Receiver, and for an interlocutory decree for accounting (Abst. 36; Rec. 164). On that day the Auditor filed a document labeled "showing" asserting in that document that the court was without jurisdiction to render its opinion on the previous appeal and that its decision is a nullity and the suit stood dismissed and he was, therefore, not required to plead (Abst. 36; Rec. 167). This document was stricken by the Court of its own motion and on December 6, 1946 the Court again refused to grant plaintiff's motion for a default but directed the Auditor to plead within 30 days (Abst. 36). The Auditor did file an answer on March 5, 1947 to the amended and supplemental complaint (Abst. 50; Rec. 229). *This answer was striken* by the Court on March 10, 1947 and he was again directed to answer within 30 days (Abst. 50; Rec. 233). *No answer was ever filed* by the Auditor to the amended and supplemental complaint. The Auditor, however, filed an

answer to the Second Amendment to the Amended Complaint (Abst. 51; Rec. 238) on April 5, 1947. The plaintiffs moved to strike this answer and to enter a decree in favor of the plaintiff on the admissions in the pleadings (Abst. 51; Rec. 242). The motion was set for a hearing on May 26, 1947 (Abst. 52; Rec. 245) and on that hearing the motion was denied and the Court sustained the demurrer to the evidence and dismissed the suit for want of equity. The Bank having been served with process and having appeared by its attorney was required to answer and on its failure to answer, the plaintiffs were entitled to default as of right. The Auditor, who failed to comply with the orders to plead, was equally in default and it was the duty of the Court to enter a decree *pro confesso* against each of them. Section 50 of the Civil Practice Act (Chap. 110, Sec. 174 (6) Smith Hurd's Illinois Ann. Stat.) provides that upon the failure to plead, a judgment for default or decree *pro confesso* should be entered. Even prior to the Civil Practice Act a defendant who failed to plead within the time allowed to plead was in default and the plaintiff was entitled to a decree *pro confesso* (*Haggard* v. *Smith*, 71 Ill. 226). Such a default admitted all material facts and that "the demand against" them "is just" and that they have no defense (*Buck* v. *Citizens Coal Mining Co.*, 254 Ill. 198, 201; *Bank of Republic* v. *Wells-Jackson Corp.*, 358 Ill. 368.

(b) Plaintiffs were entitled to a decree on the admissions in the pleadings, to discharge the Auditor's Receiver; to dismiss the Auditor's suit, to vacate all orders, to appoint a Receiver and to direct all of the defendants to account.

On June 18, 1946 plaintiffs moved to default the Auditor and the Bank, to dismiss the Auditor's action, to appoint a Receiver and for an interlocutory decree for

accounting (Abst. 35-36). This motion was denied and was renewed on May 2, 1947 (Abst. 51-52). The Court heard the motion, together with the evidence on May 26, 1947, at which time it sustained the demurrer to the evidence and dismissed the suit. The Court clearly erred when it denied the motion and it was its duty to grant the motion and its order should be reversed with directions to enter a decree as prayed for by the plaintiffs.

(1) The suit of the Auditor and the appointment of his receiver were without jurisdiction and it was the duty of the Chancellor to annul all orders entered in the Auditor's suit, to discharge his Receiver, to reject the Receiver's account, to appoint a Receiver in plaintiffs' suit and to enter an interlocutory decree for accounting.

The Court decided the legal question on the former appeal that the Auditor of Public Accounts was without power to liquidate the Bank under Section 11 of the Banking Act (326 Ill. App. 376). While the decision was only on the pleading and not on the evidence, the legal question, however, was decided that upon the state of facts as pleaded, the Court acquired jurisdiction in plaintiff's suit and that the Auditor of Public Accounts did not have jurisdiction under Section 11 of the Banking Act. When it appeared at the trial on the admissions from the respective pleadings that the facts were sustained, as originally pleaded, with the exception of the substitution of Arthur G. Strassheim as Liquidator, instead of Sell, the law of the case was binding on the trial court and it was bound to follow the decision which was controlling upon it as the law of the case.

The same court held on the former appeal that where a bank ceased to do a banking business for ten years,

under a voluntary liquidation, when all of its depositors were paid off and the voluntary liquidation was permitted by the Auditor for such a long period, that such a bank is stripped of its banking functions, and becomes an ordinary corporation and Section 11 of the Banking Act was inapplicable to such a corporate shell and the Auditor of Public Accounts could not proceed undr that Section (326 Ill. App. 376, 381).

The Receiver filed an answer to the amended and supplemental complaint wherein he admitted (Abst. 31): (1) That the plaintiffs are stockholders of the Bank; (2) That the Bank was organized under the Illinois Corporation Act to do a general banking business; (3) That the defendants Sell, Strassheim, and others were the directors of the Bank; (4) That at the close of the business of the Bank on June 23, 1934, it was indebted to various persons in substantial amounts; (5) That among the assets the Bank had real estate, stocks, bonds, loans, discounts, and customers' notes, of a value in excess of $300,000.

He also admitted (Abst. 32) that (6) prior to June 23, 1934 resolutions were duly adopted by the Directors to liquidate the Bank; that more than two-thirds of the shareholders of the Bank expressly, or otherwise, consented to the liquidation of the Bank and to the payment of its depositors; *"that the said Bank was liquidated and its depositors paid with the approval of the then Auditor of the Public Accounts of the State of Illinois"*; that the said Bank ceased accepting deposits on or about June 23, 1934 and discharged some of its employees and that no formal meeting of the shareholders of said Bank was ever held authorizing the liquidation of said Bank; (7) That on and prior to June 23, 1934, printed circulars were delivered and distributed to depositors, creditors, and to the public by the Bank stating that the Bank was paying off its depositors on June 23, and that the only continu-

ing business that will remain was the safe deposit vaults; that bonds and mortgages will be serviced by A. G. Strassheim and that a currency exchange will be installed for the present for the convenience of the neighborhood; (8) That *"said bank discharged all of its deposit liabilities"* either by paying its depositors in full or by deposit of funds in the sum of $10271.08 with the Auditor of Public Accounts for the State of Illinois pursuant to the statutes of the State of Illinois in such case made and provided, and that part of said funds so deposited with the said Auditor has been withdrawn by, or paid to persons entitled thereto so that a part only of said funds still remains with the said Auditor.

These *admissions bring the case within the principle of law announced on the prior appeal that* the Auditor of Public Accounts had no power to proceed under Section 11. Having had no power to proceed under the section as adjudicated on the former appeal, it follows that all proceedings initiated by the Auditor were *void* and the appointment of the receiver was *void* and all disbursements made by the Receiver were improper and the objections to the report should have been sustained.

For the reasons above stated the writ of *certiorari* should be granted.

Respectfully submitted,

MEYER ABRAMS,
HARRY J. MYERSON, and
LEWIS D. ROSS,
Attorneys for Petitioners.

SHULMAN, SHULMAN AND ABRAMS,
Of Counsel.